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No. 82-63.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
PETITIONER,
v.
MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief of Amici Curiae City of Fitchburg, Town of Millis, Massachusetts City Solicitors and Town Counsel Association in Support of Petitioner.

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Question Presented.

Does the constitutional obligation of municipalities to provide necessary medical care to one who is in their custody include the obligation to pay for such services?

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Interest of the Amici Curiae.

The decision of the Massachusetts Supreme Judicial Court will have significant financial impact upon the various cities and towns in the Commonwealth of Massachusetts during a period of intense fiscal austerity. Accordingly, this brief is co-sponsored by the authorized law officers of the city of Fitchburg and the town of Millis, both political subdivisions of the Commonwealth of Massachusetts, under Supreme Court Rule 36.4, and by the Massachusetts City Solicitors and Town Counsel

Association, an association representing all Massachusetts town counsel and city solicitors.

It is not uncommon for criminal suspects to require medical attention and police officers throughout Massachusetts are required to see to it that proper medical care is provided. Virtually all Massachusetts cities and towns have adopted the following model rules and regulations as promulgated by the Massachusetts Police Chiefs Association through the Massachusetts Police Institute:

> Officer in Charge
>
> B. GENERAL DUTIES AND RESPONSIBILITIES
>
> It is the duty and responsibility of the Officer in Charge to:
>
> 21. Be responsible for the care and handling of prisoners in accordance with departmental policies and procedures and the Massachusetts General Laws. Responsibilities include, but are not limited to, the following guidelines:
>
> b. If the prisoner requires medical attention, summon a physician or, if necessary, have him conveyed to a hospital.

It is to be anticipated that there will now be numerous claims against municipalities for which there are no appropriations and which will cause fiscal and administrative havoc.

Finally, from the point of view of a medium-size or small Massachusetts city or town, the normal scenario for such a claim must inevitably adversely affect the quality and perhaps the availability of medical care to those in Kivlin's position. Perhaps unlike large cities, bills for unappropriated items, such as the $5,360.41 Massachusetts General Hospital bill for

Kivlin, would receive careful public scrutiny by town finance committees, town accountants, and city councils. The police officer who has incurred such an obligation will be called to account and probably second-guessed. Should he or she have used less expensive services, or municipal medical services, or *any* medical services at all? The police officer will have incentive to make medical decisions for which he is unqualified, by shopping for cheaper medical services, or by deciding to use none at all, or else he could be criticized. The realities of small city and town politics and government will give the police officer pause at a time when his only concern should be to obtain the best medical care as soon as possible. Can such a result have been dictated by the Constitution; or, is it not more likely that the various state, federal and local regulations and laws have weighed the policy arguments free from constitutional restraint and have allocated such costs in another manner? Since we believe the latter to be the case, the city of Fitchburg, the town of Millis and the Massachusetts City Solicitors and Town Counsel Association submit this brief in support of the writ of certiorari of the city of Revere.

Argument.

I. The Massachusetts Supreme Judicial Court's Holding That the Eighth Amendment of the United States Constitution Obligates the City of Revere to Pay for Medical Care to Those in the Custody of its Police Department is in Error.

On April 12, 1982, the Massachusetts Supreme Judicial Court held that the Eighth Amendment to the United States Constitution "compels a government agency or division re-

sponsible for supplying those medical needs [to a prisoner under arrest] to pay for them." *Massachusetts General Hospital* v. *Revere*, 385 Mass. 772, 776, 434 N.E.2d 185 (1982). The lower court essentially based its opinion on this Court's holding in the case of *Estelle* v. *Gamble*, 429 U.S. 97 (1976), which was cited to support the proposition that a government's obligation to refrain from deliberate indifference to the serious medical needs of a prisoner is a protection afforded by the Eighth Amendment of the United States Constitution.

In rejecting the city of Revere's argument that *Estelle* v. *Gamble* protects only those prisoners who are being punished by incarceration, the Supreme Judicial Court held that "[i]t is not the fact of incarceration, however, that triggers the protections afforded by the Eighth Amendment. Rather it is the suspect's loss of freedom when he 'cannot by reason of the deprivation of his liberty, care for himself.'" *Massachusetts General Hospital* v. *Revere*, *supra*, at 777, (citation omitted). This holding not only contravenes the rule of *Estelle* v. *Gamble*, but unnecessarily extends it contrary to the spirit and the protections afforded by the Eighth Amendment. This Court and almost all lower courts have repeatedly held that the Eighth Amendment's protections are available only to those who have been convicted of criminal acts.

In *Estelle* v. *Gamble*, prisoner Gamble was injured while performing work on a prison work assignment. A bail of cotton fell on him and he sustained a back injury. This injury necessitated at least 17 trips to the prison infirmary over a three month period. Gamble's civil rights action was prosecuted under § 1983 of Title 42 of the United States Code and his complaint alleged that the petitioners subjected him to cruel and unusual punishment in violation of the Eighth Amendment made applicable to the states by the Fourteenth Amendment. This Court noted that "the primary concern of

the drafters [of the Eighth Amendment of the Constitution] was to proscribe 'torture[s]' and other 'barbar[ous]' methods of punishment." *Estelle* v. *Gamble*, *supra*, at 102 (citation omitted). Although the types of punishment that the amendment proscribed have become more sophisticated, this Court stated that the amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .," *Jackson* v. *Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) against which we must evaluate penal measures." *Estelle* v. *Gamble*, *supra*, at 102. This Court concluded that the deliberate indifference to serious medical needs of prisoners constitutes "unnecessary and wanton infliction of pain." *Id.* at 104.

That the Eighth Amendment is restricted solely to *criminal punishment* was dealt with squarely by this Court in *Ingraham* v. *Wright*, 430 U.S. 651 (1977). *Ingraham* involved a petition by junior high school students requesting damages, injunctive, and declaratory relief alleging that their rights had been violated by being subjected to disciplinary corporal punishment in violation of the Eighth Amendment. While the evidence tended to show that the paddlings of the petitioners were exceptionally harsh, this Court held that the cruel and unusual punishment clause of the Eighth Amendment did not apply to disciplinary corporal punishment in public schools.

In recounting the history of the Eighth Amendment, this Court said that "in light of this history it is not surprising to find that every decision of this court considering whether a punishment is 'cruel and unusual' within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment." *Id.* at 666 citing *Estelle* v. *Gamble*, *supra*, *Gregg* v. *Georgia*, 428 U.S. 153 (1976) and *Powell* v. *Texas*, 392 U.S. 514 (1968), *inter alia*. "The primary purpose . . . has always been considered, and properly so, to be directed at the method or kind or punishment imposed for the violation of *criminal statutes*." *Powell* v. *Texas*, *supra*, at 531-532 (emphasis supplied).

Amici submit that that Massachusetts court's reliance on the Eighth Amendment is in error due to the fact that Patrick Kivlin had not been criminally adjudicated. Even assuming *arguendo* that there is Eighth Amendment protection in such situations, there is no basis in fact that would support a conclusion that the city of Revere was "*deliberately* indifferent" to the medical needs of Mr. Kivlin. Quite the contrary findings are apparent from the record. The police officer summoned an ambulance immediately after the shooting and rode in the ambulance with Mr. Kivlin.

Estelle v. *Gamble* and those cases from which this Court drew upon in that decision *all* involve factual situations where clearly there was a showing of deliberate indifference. The case at bar presents no such factual record.

II. There is No Other Constitutional Authority for the Lower Court's Proposition That the Arresting Jurisdiction Pay for Necessary Health Care for Those Within Police Custody.

This Court has ruled on the limits of punishment where there has been no criminal adjudication such as in matters involving pretrial detention. This Court has held that the due process clause of the Fourteenth Amendment establishes the limits on such punishment. See *Bell* v. *Wolfish*, 441 U.S. 520 (1979), where this Court held that the due process clause governs the conditions of confinement for pretrial detainees.

Pretrial detainees are guaranteed needed medical care by the due process clause of the Fourteenth Amendment. Obviously, fundamental fairness and the basic concepts of due process mandate medical care for one who is incarcerated and suffering from serious illness or injury. *Fitzke* v. *Shappell*, 468 F.2d 1072 (6th Cir. 1972).

> An individual incarcerated, whether for a term of life for the commission of some heinous crime, or merely for the night to 'dry out' in the local drunk tank, becomes both vulnerable *and* dependent upon the state to provide certain simple and basic human needs . . . . Denial of necessary medical attention may well result in disabilities beyond that contemplated by the incarceration itself.

Id. at 1076.

The Fourteenth Amendment, therefore, must be read so as to recognize the distinct status of a pretrial detainee, such as the case in bar. Restrictions imposed on detainees are defensable only when they can be justified by the requirements of prison administration or are inherent in the nature of confinement. If the added burdens do not meet the standard, they violate the detainees constitutional right to due process of law. *Norris* v. *Frame*, 585 F.2d 1183 (3d Cir. 1978).

While it is clear that a pretrial detainee such as Patrick Kivlin enjoys such constitutional rights, nowhere in the record is there the slightest intimation that any of those rights were violated. On the contrary, the record reflects that Mr. Kivlin enjoyed immediate and expert medical treatment, the payment for which the lower court has held that city of Revere responsible. Nowhere in the cases cited by this Court or by the Massachusetts court is there the proposition that the duty to provide needed medical care includes the duty to pay for such.

The lower court's holding that the Eighth Amendment mandates that the city of Revere must pay for such medical care is a dangerous step unsupported by constitutional precedent. This Court has *never* indicated that the duty to provide such medical care assumes the duty to pay for same. All the cases cited above deal *solely* with the issue of *when* the duty to provide such care arises and not with the responsibility to pay for same.

It is interesting to note that Massachusetts has legislated a comprehensive statutory scheme which directs hospitals to provide services without regard to economic condition. Mass. Gen. Laws c. 111, § 70(E). This statute together with related welfare and federal legislation (Hill-Burton Act; c. 958, § 601 *et seq.*, 60 Stat. 1041 (1946), codified at 42 U.S.C. § 291 (1976), insures that a prisoner's medical needs will not go unattended. Who pays for this is not a matter of constitutional concern.

For this Court to extend its holding to allocate the responsibility for the *payment* of needed medical services would be an unwarranted intrusion into strictly state matters.

Conclusion.

The judgment of the Massachusetts Supreme Judicial Court, insofar as it reversed the granting of petitioner's motion for summary judgment, should be reversed.

Respectfully submitted,

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